87-1987

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

—o—

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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38 pp

QUESTIONS PRESENTED

1. WHETHER THE AFFIRMATIONS OF THE THIRD CIRCUIT COURT OF APPEALS AND THE MIDDLE DISTRICT OF A FINDING BY A SPECIAL BOARD OF ADJUSTMENT DENYING BACK PAY AND OTHER BENEFITS, DESPITE A FINDING THAT THE URINE TEST RELIED UPON WAS NOT COMPETENT EVIDENCE BECAUSE CONSOLIDATED RAIL CORPORATION FAILED TO PRESENT ADEQUATE EVIDENCE AS TO THE CHAIN OF CUSTODY OF THE URINE SAMPLE RENDERING THE FINDING WHOLLY BASELESS AND WITHOUT REASON, ARE IN ERROR.

2. WHETHER ANY INDIVIDUAL'S FOURTH AMENDMENT RIGHT TO PRIVACY NECESSITATES THE USE OF CAREFULLY SAFEGUARDED DRUG TESTING PROCEDURES AS FOUND IN THE FEDERAL RULES OF EVIDENCE.

PARTIES BELOW

Petitioner/Appellant/Petitioner Below
Donald H. Moore

Respondents/Appellees/Respondents Below
Consolidated Rail Corporation

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

THE PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS v

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING PETITION

A. THE DECISION BELOW IS CONTRARY TO THE STATUTE, 42 U.S.C. SECTION 153 (FIRST), IN THAT THE FINDING OF THE SPECIAL BOARD OF ADJUSTMENT TO DENY BACK PAY AND OTHER BENEFITS, RELYING ON A URINE TEST FOUND NOT TO BE COMPETENT EVIDENCE BECAUSE OF A LACK OF ADEQUATE EVIDENCE AS TO THE CHAIN OF COMMAND, IS WHOLLY BASELESS AND WITHOUT REASON, MAKING FEDERAL JUDICIAL REVIEW PROPER AND JUST 7

B. IT IS AGAINST PUBLIC POLICY TO ALLOW SPECIAL BOARDS OF ADJUSTMENT TO RULE ON MATTERS WITH NO COMPETENT EVIDENCE AS A BASIS FOR THE DECISION AND TO ALLOW THAT DECISION TO STAND ABSOLUTE WITH NO REVIEW AVAILABLE TO THE PARTIES INVOLVED 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES	PAGE
Brotherhood of Locomotive Engineers v. Burlington Railroad Company, 838 F.2d 1087 (9th Cir. 1988)	9, 12
Grimes v. Louisville and Nashville R. Co., 583 F. Supp. 642 (S.D. Indiana, 1984)	11
Gunther v. San Diego and Arizona Eastern Railway Co., 382 U.S. 257 (1965)	11
Rinker v. Penn Central Transportation Co., 350 F. Supp. 217 (E.D. Pa. 1972)	11
Zeviar v. Local 2747 Airline, etc., Employees, 733 F.2d 556 (8th Cir. 1984)	10

FEDERAL STATUTES

28 U.S.C. Section 1254(1)	2
42 U.S.C. Section 153 (First)	2, 6, 7, 11

No. .....

In The

Supreme Court of the United States

October Term, 1987

DONALD H. MOORE,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Donald H. Moore seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in Case No. 87-5739, *Moore v. Consolidated Rail Corporation,* unreported (3rd Cir. 1988).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported, it is reproduced in Petitioner's Appendix ("P. App.") at 1A through 6A. The original Memorandum and Order of the United States District Court for the Middle District of Pennsylvania dismissing Petition for review of an award made by Special Board of Adjustment is unreported; it is reproduced in P. App. at 9A through 14A. The decision of the Special Board of Adjustment finding the urine test results unreliable and reinstating Petitioner without back pay is reproduced at P. App. 15A through 20A.

JURISDICTION

On March 11, 1988, the Third Circuit Court entered judgment affirming the District Court's dismissal of the Petition for review of the award of the Special Board of Adjustment. Based on the Third Circuit's entry of judgment, this Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) (1982).

STATUTE INVOLVED

42 U.S.C. Section 153 (First).

STATEMENT OF THE CASE

Donald H. Moore has been, with the exception of one interruption due to the improper firing, an employee of Consolidated Rail Corporation from 1971 until the present. Consolidated Rail Corporation is a Railway Carrier as defined by the Railway Labor Act.

In his years of service for Consolidated Rail Corporation, Donald H. Moore had a good record. Prior to July of 1985, there was not a scintilla of evidence Donald H. Moore ever engaged in the consumption of illegal drugs. In July of 1985, an anonymous phone caller claimed that Donald H. Moore was a drug user. Consolidated Rail Corporation forced Donald H. Moore to submit to a urine test on July 25, 1985, based solely upon this anonymous phone call.

Consolidated Rail Corporation promptly lost the sample and then discovered the sample. Despite the fact that the sample was lost, Consolidated Rail Corporation attempted to have the sample analyzed. The sample was found to be of insufficient confirming value.

Consolidated Rail Corporation then forced Donald H. Moore to submit to a second test on August 2, 1985. Donald H. Moore was then fired. Donald H. Moore appealed this decision and hearing was held on September 6, 1985 and September 19, 1985. These hearings were before a Hearing Officer as required by the Railway Labor Act.

After the hearings, the Hearing Officer upheld the decision to terminate Donald H. Moore. Donald H. Moore filed a timely Appeal and a review of this decision was conducted by the Special Board of Adjustment. Donald

H. Moore demanded, on Appeal, removal of the discipline and payment for all time lost, including reasonable compensation for mental and physical distress, traveler's benefits, dental plan, Title VII allowance, vacation rights and retirement benefits.

On December 22, 1986, the Special Board of Adjustment overturned the decision of the Hearing Officer and held that Donald H. Moore was to be reinstated. A copy of the findings of the Special Board of Adjustment is set forth at P. App. 15a through 20a.

The Special Board of Adjustment held that Donald H. Moore had a "good prior record" (P. App. 15a) in his 15 years as a locomotive engineer and that there was not competent indication that Donald H. Moore had engaged in the conduct of which he was accused prior to the incident which led to his wrongful dismissal.

The Special Board of Adjustment further held that competent evidence was not presented supporting Donald H. Moore's dismissal and that, therefore, Donald H. Moore should be reinstated.

The Special Board of Adjustment found:

> ". . . this Board would not have reinstated claimant . . . if the record had established a reasonable doubt that claimant could be relied upon as an engineer." (P. App. 19a).

The decision of the Board mentions two drug tests which were used to determine whether Donald H. Moore used marijuana. The first test was of July 25, 1985, which was lost and then found to be of insufficient confirming value. A second sample was taken on August 2, 1985. This

sample and subsequent analysis of the sample was held to be irrelevant by the Board.

The Board noted that the rights of individual employees must be protected when it comes to handling of urine samples. The Board found that there was ". . . no clear evidence as to the chain of possession", (P. App. 18a). As a result, the Board ordered that Donald H. Moore be reinstated as an employee.

Article G-C-9 of the Collective Bargaining Agreement provides that where discipline is expunged, the employee is to be paid for lost wages (P. App. 21a through 23a). Despite the aforementioned holdings of the Board as to the urine samples and the Collective Bargaining Agreement, the Board ordered that Donald H. Moore was to be reinstated without back pay. No explanation was provided for the Board's decision to deny back pay.

On June 30, 1987, this action was commenced by Donald H. Moore's Petition for Review and Enforcement under Section 3 (First) of the Railway Labor Act. Consolidated Rail Corporation was the named Respondent.

Donald H. Moore was discharged by Consolidated Rail Corporation on September 24, 1985, for the alleged use of marijuana. Pursuant to the Railway Labor Act, Donald H. Moore challenged this decision at a hearing before a Hearing Officer. The Hearing Officer decided in favor of Consolidated Rail Corporation and Donald H. Moore appealed to the Special Board of Adjustment. The

Special Board of Adjustment rendered a decision reinstating Donald H. Moore, but denying back pay as well as other benefits. (P. App. 15a through 20a). Donald H. Moore appealed this decision to the United States District Court by filing the aforementioned Petition.

On August 17, 1987, Consolidated Rail Corporation filed a Motion to Dismiss the Petition. On September 25, 1987, the Honorable William Caldwell of the Middle District Court of Pennsylvania issued a Memorandum and Order granting Consolidated Rail Corporation's Motion to Dismiss the Petition.

———o———

REASONS FOR GRANTING THE PETITION

The decision of the Third Circuit is in direct conflict with the provisions of the controlling statute, 42 U.S.C. Section 153(q) (First). The Petition of review of the findings of the Special Board of Adjustment was proper in that the findings of the Board were wholly baseless and without reason. In addition it is completely against the ideals of the Constitution of the United States to allow a judicial entry to exist and concurrently exercise legislative and executive powers as this Special Board has done, particularly in an area of such sensitivity as drug testing, requiring special attention and review procedures to ensure the protection of employees' rights.

A. THE DECISION BELOW IS CONTRARY TO THE STATUTE, 42 U.S.C. SECTION 153 (FIRST), IN THAT THE FINDING OF THE SPECIAL BOARD OF ADJUSTMENT TO DENY BACK PAY AND OTHER BENEFITS, RELYING ON A URINE TEST FOUND NOT TO BE COMPETENT EVIDENCE BECAUSE OF A LACK OF ADEQUATE EVIDENCE AS TO THE CHAIN OF COMMAND, IS WHOLLY BASELESS AND WITHOUT REASON, MAKING FEDERAL JUDICIAL REVIEW PROPER AND JUST.

Since Subsection (q) of U.S.C. Section 153 (First) provides that the Board's decision forms the basis for Appellate review, the language of the decision is obviously critical. The Board noted that Donald H. Moore had a "reasonably good record" (P. App. 15a), and that there was apparently no suspicions that Donald H. Moore used drugs until a single, anonymous phone caller made this serious accusation. (P. App. 16a).

As a result of this anonymous phone call, Consolidated Rail Corporation forced Donald H. Moore to submit to a urine test on July 25, 1985. This test, however, was lost and subsequently reappeared and was determined to be insufficient confirming value. (P. App. 16a). Consolidated Rail Corporation proceeded to require Donald H. Moore to submit to a second urine test which he complied with on August 2, 1985. (P. App. 16a). The second test was found to be positive. (P. App. 17a). Upon review, the Board stated that "no clear evidence as to the chain of possession during transit" was presented as to this second test. (P. App. 18a).

The Board correctly noted that:

> ". . . the gravity of the drug problem does not relieve any employer from making certain that the engi-

> neer is accorded all the procedural protection that elementary principles of due process, fair play and common sense require. Mere suspicion, conjecture and hearsay may never be substituted for competent proof." (P. App. 17a).

The Board scrutinized the evidence and properly held that the positive reading from the August 2, 1985 test would not support the firing because of the lack of evidence as to chain of custody.

Chain of possession or custody is not a trivial matter which the courts may wink at or choose to overlook when convenient. The Board was absolutely correct in overturning the firing on this critical ground. The award of the Board, however, provides that reinstatement is to occur without back pay. (P. App. 19a). There is no explanation as to the reasoning for the denial of back pay.

The Middle District Court attempted to provide this missing explanation. The Court noted on Page 4 of its Memorandum that:

> "A fair reading of the decision indicates that, while it is believed that the deficiency in the record did not justify discharge, the record was insufficient to justify a suspension without pay for having used marijuana." (P. App. 12a).

The citation from Page 4, however, is not a fair reading of the Board's decision. The Board's decision was that the second test was rendered unreliable by the failure to provide adequate testimony as to the critical issue of chain of custody. The result of this decision was quite simply: no evidence to prove the use of marijuana.

The Middle District's Memorandum, therefore, is illogical on this critical ground. If the one piece of evi-

dence is entirely tainted on the issue of dismissal, must it not likewise be entirely tainted on the interrelated issue to back pay? Consolidated Rail Corporation has argued that the Board must have used this tainted evidence in order to reduce the discipline. This argument, which was adopted by the Middle District Court, has no basis in law or in the Board's Order.

In a very recent Ninth Circuit decision, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087 (9th Cir. 1988), it was held that the Fourth Amendment right to privacy is paralleled by a right of employees to an expectation of privacy between the employee and employer. An employee has the right to certain expectations concerning an employer's invasion of this privacy.

Just as justice requires that the Fourth Amendment has parallels in non-governmental employer/employee relationships, so, too, does it require that there is a uniformity in the application of the rules of evidence between administrative proceedings and state and federal adjudicatory proceedings. A person's rights which require protection in the court system need no less protection in the setting of an administrative hearing when the decision rendered can have just as far reaching and damaging effects as in the formal court environment as seen here.

Consolidated Rail Corporation did not raise any objections to the Board's clear finding that there was insufficient proof as to chain of custody. This finding was binding on the Middle District Court. The Middle District ignored the importance of the Board's evidentiary finding. The purpose of proof of chain of custody is to

show that the sample was not altered or that the sample was from Donald Moore. If Consolidated Rail Corporation could not prove that the sample was not altered or that the sample was from Donald Moore, the results of the analysis of the sample are irrelevant. The Middle District Court erred by even mentioning the results of the test, as a basis for a decision.

Paragraph 15 of the Petition alleges that denial of back pay is contrary to the Collective Bargaining Agreement and that the Special Board of Adjustment exceeded its authority and was without jurisdiction under the Railway Labor Act to deny back pay. Article G-C-9(h) of the Collective Bargaining Agreement specifically provided that where discipline is expunged, the engineer shall be paid for such wage losses incurred. (P. App. 21a through 23a).

In a case discussing denial of back pay under the Railway Labor Act, it has been held that it is proper to determine whether the Collective Bargaining Agreement gave the Special Board of Adjustment the authority to make its award as it did. *Zeviar v. Local 2747 Airline, etc., Employees,* 733 F.2d 556, 559 (8th Cir. 1984). In the matter confronting this Court, the Collective Bargaining Agreement has spoken as to this issue. The Board may not simply ignore the language in Article G-C-9(h).

It has been held that where the award drew its essence from the Collective Bargaining Agreement, the Court may not review the merits of the award. *Id.* Conversely, it must be true that where the award issued ignores the Collective Bargaining Agreement, this Court should and must review the decision.

As stated previously, Subsection (q) of Section 153 (First) permits review of Special Board of Adjustment decisions which fail to confine to matters within the scope of its jurisdiction. Donald H. Moore has met this burden. Denial of back pay is clearly outside the Board's jurisdiction that the Board ignored the Collective Bargaining Agreement in reaching its decision.

Furthermore, awards of the Special Board of Adjustment are subject to review if they are wholly baseless and completely without reason. In this case, it is alleged that Donald H. Moore was exonerated of the charges. He was punished nevertheless. This is clearly improper. If the Board of Adjustments is to punish Donald H. Moore as it did, some reasonable basis must exist and must be stated in the Order.

This separate ground for review was established by the United States Supreme Court in *Gunther v. San Diego and Arizona Eastern Railway Co.*, 382 U.S. 257, 86 S. Ct. 368, 15 L.Ed.2d 308 (1965). See also *Rinker v. Penn Central Transportation Co.*, 350 F. Supp. 217, 219 (E.D. Pa. 1972). It has also been held that the Board's decision is outside its jurisdiction if the decision is without foundation and reason in fact or is wholly baseless and without reason. *Grimes v. Louisville and Nashville R. Co.*, 583 F. Supp. 642, 641 (S.D. Indiana 1984).

B. IT IS AGAINST PUBLIC POLICY TO ALLOW SPECIAL BOARDS OF ADJUSTMENT TO RULE ON MATTERS AND NO COMPETENT EVIDENCE AS A BASIS FOR THE DECISION AND TO ALLOW THAT DECISION TO STAND ABSOLUTE WITH NO REVIEW AVAILABLE TO THE PARTIES INVOLVED.

The Special Board of Adjustment was created to solve minor disputes arising out of interpretation or applica-

tion of an existing agreement. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company,* 838 F.2d 1087 (9th Cir. 1988). When such a board needs to make decisions on matters as sensitive and important as the propriety and competency of particular drug testing strict compliance with the rules of evidence is proper and just. Issues such as drug testing involve parallel rights of the fundamental constitutional right to privacy and as such demands a particularly specific degree of uniformity between administrative hearings and the court system. To allow an administrative board to make decisions wholly baseless and without reason and without review available is to return to a McCarthy style of adjudicatory proceedings which is without a doubt against the public policy of this Court and this Nation.

—o—

CONCLUSION

In this case, there is nothing in the decisions which could possibly justify Donald H. Moore's severe punishment. Consolidated Rail Corporation has stated that Page 3 of the Board's decision indicated a finding that Donald H. Moore tested positive for marijuana. This is a misstatement in the Board's decision. The Board's decision was that the procedure used for the keeping of the positive specimen was so inadequate that it could not support the decision to fire Donald H. Moore. If specimen procedures were so inadequate that Donald H. Moore could not be fired based upon a positive reading, how can the same specimen be used to punish Donald H. Moore? This rea-

soning is clearly illogical and not based upon fact or reason.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

1. Third Circuit Court of Appeals Decision 1A
2. Judgment of Third Circuit 6A
3. Memorandum & Order of Judge Caldwell 8A
4. Findings of Special Board of Adjustment 0.894..... 13A
5. Article G-C-9 of Collective Bargaining Agreement 17A

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5739

MOORE, DONALD H.,

Appellant

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Civil Action No. 87-0917
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit rule 12(6)
March 8, 1988

BEFORE: WEIS, GREENBERG, and ALDISERT,
Circuit Judges

(Filed Mar. 11, 1988)

MEMORANDUM OPINION

GREENBERG, *Circuit Judge*

Petitioner, Donald H. Moore, appeals from an order entered in the district court on September 25, 1987 dismissing his petition to review an award made by a Special Board of Adjustment following a hearing under the Railway Labor Act reinstating him without back pay following his discharge by respondent, Consolidated Rail

Corporation, for the alleged use of marijuana on Conrail's property. The facts significant to us for this appeal are not in dispute.

In July 1985 Conrail received an anonymous call stating that Moore was using drugs. Consequently, Conrail required that Moore submit to a urine analysis on July 25, 1985. Unfortunately, however, the sample from that test was lost and then when recovered was found to be inconclusive. On August 2, 1985 he was again tested. The Board described the procedure for this second test as follows:

> The test took place at Carrier's Regional Medical Office at Philadelphia and Carrier's Dr. Brindisi, Registered Nurse Farrell and Health Service Manager McGee were present at the time. The container holding the specimen was handed by claimant to Dr. Brindisi immediately after it was given and the Doctor in turn gave it to Ms. Farrell who placed the container with the specimen in another container properly labeled and secured by a cap. She then placed it in a labeled bag with a note for Metpath Laboratories requesting analysis and report. That procedure took place at about noon and about two hours later the bag was picked up by a Metpath messenger.

This report of the test was understood by the Board to be positive for marijuana. Though Moore does not concede the accuracy of the report he does not suggest that the Board's understanding of what the report meant is incorrect.

As a result of the report Conrail, after a hearing, discharged Moore who then administratively appealed as authorized by 45 U.S.C. § 153. The appeal was heard by a

three member Board with a neutral chairman and a carrier and an employee member. *See United Steelworkers of America v. Union Railroad Co.*, 648 F.2d 905 913 (3d Cir. 1981). In its decision the Board noted that Moore had a reasonably good record with discipline having been imposed on him twice in 15 years. The Board recognized that the use of a narcotic by an engineer is a serious matter but cautioned that an employee should be disciplined only on the basis of appropriate evidence. It indicated that Conrail had made a determined effort to observe most of the requirements to make an appropriate case but that "[t]he record is not as clear as it should be, however, since there is no clear evidence as to chain of possession during transit from Carrier to the Laboratories and of the Laboratories' procedures."

The Board said that upon "weighing all aspects of the case, the hazards involved, the respective interests of the parties and the shortcomings in the record, it is our conclusion that claimant should be reinstated with seniority unimpaired but without back pay." It pointed out that it would not have reinstated Moore despite errors made by Conrail if the record had established a reasonable doubt that he could be relied on as an engineer. It said that before he could return to active duty he must pass a physical examination including a drug screening.

Moore filed a petition for review of the award in the district court seeking a remand of the matter to the Board so that he could be awarded back pay. Conrail subsequently moved to dismiss the petition for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In a memorandum opinion on September 25, 1987 Judge Caldwell granted this motion. He indicated

that Moore argued that he was entitled to relief because the collective bargaining agreement governing his employment provided that when discipline is expunged an engineer who has a wage loss shall be paid for the loss. Here, according to Moore, the discipline had been expunged and thus he was entitled to back pay. The judge rejected this contention as he found that:

> The Board did not expunge the discipline or find the petitioner not guilty of having used marijuana. A fair reading of its decision indicates that, while it believed that the deficiencies in the record did not justify discharge, the record was sufficient to justify a suspension without pay for having used marijuana. In this light, the Board, as the respondent asserts, merely reduced the discipline, and the failure to award back pay consequently did not ignore the agreement. We cannot disturb a decision which draws its essence from the collective bargaining agreement.

Moore further argued that once the Board concluded that there were procedural irregularities concerning the sample, it necessarily had to conclude that there was no basis for finding that he had been using marijuana and thus he should have been awarded back pay. The judge rejected this argument as he found no statutory basis for setting aside the Board's order, citing *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 99 S.Ct. 399 (1978). He further indicated that the Board's decision was not irrational and without foundation. On September 25, 1987 the judge entered the order granting Conrail's motion from which Moore appeals.

On this appeal Moore asserts that Judge Caldwell's ruling was flawed as a "piece of evidence," the test report, if "entirely tainted" for one purpose, dismissal, was also tainted for purposes of denial of back pay. He also

argued, as he did in the district court, that the collective bargaining agreement required the back pay award.

We affirm substantially for the reasons set forth by Judge Caldwell and note that cases decided after he ruled support his result. *See United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 108 S.Ct. 364 (1987); *United States Postal Service v. National Ass'n of Letter Carriers,* No. 87-3501, 3d Cir., decided February 5, 1988. We do, however, add the following comment. While there is logic in Moore's argument that evidence is either tainted or not, there was some proof of a chain of custody. We read the record to mean that while this chain was not perfect the Board was to some degree accepting the test results. This understanding is buttressed by the fact that the Board required Moore to go through a drug screening before returning to work. If the Board did not think there was a drug problem here it is difficult to comprehend why it would have ordered the screening. Thus, though Conrail accepts the award of the Board, the inconsistency, if any, in its award may have been in ordering Moore's reinstatement rather than denying him back pay.

Conrail in its brief asks for damages under Fed. R. App. P. 38. While we reject Moore's appeal, as we have indicated there is a certain logic in his position. In the circumstances we cannot find Rule 38 applicable here.

The order of September 25, 1987 will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

/s/ Morton J. Greenberg
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5739

MOORE, DONALD H.,
Appellant

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court
for the Middle District of Pennsylvania

Civil Action No. 87-0917

District Judge: Honorable William W. Caldwell

BEFORE: WEIS, GREENBERG, and ALDISERT,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania, and was submitted under Third Circuit Rule 12(6) on March 8, 1988.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the District Court entered on September 25, 1987, be and the same is hereby affirmed.

Costs shall be taxed against appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

March 11, 1988

Certified as a true copy and issued in lieu
of a formal mandate on April 4, 1988

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of
Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD H. MOORE, Petitioner	)	
vs.	)	CIVIL ACTION NO. 87-0917
CONSOLIDATED RAIL CORPORATION, Rsspondent	)	

MEMORANDUM

(Filed Sep. 25, 1987)

Introduction

This case comes before the court on respondent, Consolidated Rail Corporation's (Conrail), motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. Pro. 12(b)(6). We grant respondent's motion.

Background

Petitioner, Donald H. Moore, has filed a petition for review and enforcement, pursuant to Section 3 (First) of the Railway Labor Act. 45 U.S.C. § 153 (First). He seeks to modify a decision of the Special Board of Adjustment (Board) which, while reinstating him to his railroad engineer's job with Conrail, did so without back pay, the relief he seeks in the instant petition. Petitioner was an engineer with Conrail from 1971 until his discharge on September 24, 1985. In August of 1985, respondent had suspected that Moore was using drugs while at work. Accordingly, Conrail tested petitioner s urine on two separate occasions. Moore's second test was positive for the

presence of marijuana metabolites. Respondent held a hearing on September 24, 1985 at which time Moore was dismissed, based on the results of this test, for using marijuana while on company property under pay and subject to duty.

Petitioner appealed his dismissal to the Board pursuant to the Act. The Board reinstated petitioner effective January 30, 1987, but it did not award him back pay. In doing so, the Board concluded that the record of the Conrail hearing resulting in petitioner's discharge did not adequately show the chain of possession of the urine sample from Conrail to the testing laboratory or the laboratory's procedures in testing the sample. It noted its concern for procedural rights when the charged misconduct could result in a loss of livelihood, but also emphasized Conrail's "determined efforts" to meet those requirements. Thus, the Board noted that a physician and nurse testified to the circumstances surrounding the taking of the sample and its identification and the existence of the laboratory report, showing the presence of marijuana metabolites. The Board then stated: "Upon weighing all aspects of the case, the hazards involved, the respective interests of the parties and the shortcomings in the record, it is our conclusion that claimant should be reinstated with seniority unimpaired but without back pay."

Discussion

The jurisdiction of federal courts to review decisions of the Special Board of Adjustment is statutorily limited. The court has jurisdiction to hear an appeal of a Board decision only ". . . for failure of the [Board] to comply

with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." 45 U.S.C. § 153 (first) (q) (brackets added). This is a very narrow standard of review. *See United Steelworkers of America v. Union Railroad Co.*, 648 F.2d 905 (3d Cir. 1981). Plaintiff has alleged neither violations of chapter 153 nor that the Board acted fraudulently or corruptly. We may therefore only set aside its decision if it exceeded its jurisdiction when it failed to award back pay in alleged violation of the Agreement.[1]

Petitioner's first argument is based on the following language found at Article G-C-9(h) of the collective bargaining agreement. (Complaint, Exhibit B):

> When discipline assessed as a result of a formal investigation is subsequently expunged, an engineer who has incurred wage loss shall be paid for such wage loss incurred. When discipline assessed is subsequently reduced, an engineer who has incurred wage loss shall be paid for such wage loss during any period not part of his final discipline assessment."

Petitioner contends that the Board expunged the discipline by concluding that there were procedural irregularities in the handling of his urine sample and consequently reinstating him. Hence, the clear language of the agreement required an award of back pay as well. We disagree.

---

1. We reject petitioner's claim that we may reverse the Board if its decision was wholly baseless and without reason. In any event, even if we agreed with petitioner, the Board's decision, as shown below, would not have fallen short of that standard.

The Board did not expunge the discipline or find the petitioner not guilty of having used marijuana. A fair reading of its decision indicates that, while it believed that the deficiencies in the record did not justify discharge, the record was sufficient to justify a suspension without pay for having used marijuana. In this light, the Board, as the respondent asserts, merely reduced the discipline, and the failure to award back pay consequently did not ignore the agreement. We cannot disturb a decision which draws its essence from the collective bargaining agreement. *See Zeviar v. Local No. 2747,* 733 F.2d 556 (8th Cir. 1984).

Petitioner's next argument is that once the Board concluded that there were procedural irregularities concerning the sample, it necessarily had to conclude that there was no basis for finding that petitioner had been using marijuana. Without that finding, it was completely irrational to deny back pay. We have already rejected petitioner's argument that we may use an absence of rationality standard in reviewing the Board's decision. The Supreme Court has "time and again emphasized" that we are limited to the grounds for review provided by the Act. *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 93, 99 S.Ct. 399, 402, 58 L.Ed.2d 354, 359 (1978) (per curiam). In any event, in accordance with our discussion above, we do not find the Board's decision irrational or without foundation.

We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: September 25, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD H. MOORE,	)	
	)	
Petitioner	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 87-0917
CONSOLIDATED RAIL CORPORATION,	)	
	)	
	)	
Respondent	)	

ORDER

(Filed September 25, 1987)

AND NOW, this 25th day of September, 1987, it is ordered that:

1. Respondent's motion to dismiss the petition is granted.

2. The petition is hereby dismissed.

3. The Clerk of Court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Award No. 848

Case No. 848

Special Board of Adjustment No. 894

PARTIES TO DISPUTE:

Brotherhood of Locomotive Engineers
and
Consolidated Rail Corporation

STATEMENT OF CLAIM:

Appeal by Engineer D. H. Moore from dismissal on September 24, 1985. Claim for removal of discipline and payment for all time lost, including reasonable compensation for mental and physical duress, travelers benefits, dental plan, Title VII allowance, vacation rights and retirement benefits.

FINDINGS:

Claimant was dismissed, after a hearing had been held on due notice, for using marijuana while on Company property, under pay and subject to duty on August 2, 1985.

Claimant had a reasonably good record. In the course of 15 years service as a locomotive engineer he had been disciplined twice, a reprimand in 1981 and a five-day suspension in early 1984 for train operating errors. So far as the record shows, there is no competent indication that he had engaged in a Rule G violation prior to August 1985. The fact that he had a good prior record would not protect him from dismissal if he were found guilty of using drugs.

Regional Road Foreman Black's suspicions were roused in July, 1985 when he received an anonymous telephone call that claimant was using drugs. On the strength of that

call, claimant was given a urine test on July 25, 1985 at one of Carrier's medical facilities, but that test was then temporarily lost and then found insufficient to be of confirming value.

Accordingly, claimant was again tested, this time on August 2, 1985, when he was not operating a train but was on the engineer's extra list. The test took place at Carrier's Regional Medical Office at Philadelphia and Carrier's Dr. Brindisi, Registered Nurse Farrell and Health Service Manager McGee were present at the time. The container holding the specimen was handed by claimant to Dr. Brindisi immediately after it was given and the Doctor in turn gave it to Ms. Farrell who placed the container with the specimen in another container properly labeled and secured by a cap. She then placed it in a labeled bag with a note for Metpath Laboratories requesting analysis and report. That procedure took place at about noon and about two hours later the bag was picked up by a Metpath messenger.

Metpath's report of August 4, 1985 advised Carrier that the specimen was positive,

"THC, urine, GT 50 micrograms per liter."

It is quite apparent that the use of a narcotic by a locomotive engineer is a matter of serious concern to his employer and indeed to the public. That it provides a valid basis for dismissal is equally clear. Nevertheless, the gravity of the drug problem does not relieve an employer from making certain that the engineer is accorded all the procedural protection that elementary principles of due process, fair play and common sense requires. Mere su-

spicion, conjecture and hearsay may never be substituted for competent proof.

In any such case, qualified witnesses should be made available to furnish information, on direct and cross examinations, as to the nature and effect of the chemical substance involved, the manner in which the test was given; the procedures or protecting the specimen during time delays, transit and storage, and the details regarding analysis at the Laboratory.

In brief, it must be shown that the rights of the individual have been protected. And that obligation becomes all the more sensitive and important when the misconduct imputed to him is particularly serious and reprehensible and gives rise to loss of livelihood.

In the present case, Carrier made a determined effort to observe most of these requirements. It did not rely on the anonymous call to Black. The findings as to the taking of the test were based on testimony by a physician, a registered nurse, and the health facility manager; the findings regarding the analysis rest on Metpath Laboratories' report.

The record is not as clear as it should be, however, since there is no clear evidence as to chain of possession during transit from Carrier to the Laboratories and of the Laboratories' procedures.

Upon weighing all aspects of the case, the hazards involved, the respective interests of the parties and the shortcomings in the record, it is our conclusion that claimant should be reinstated with seniority unimpaired but without back pay. In reaching this decision, we have not

been impressed by Petitioner's hearing procedure objections; they do not constitute reversible error. Nor have we given undue weight to the fact that claimant's tests were prompted by an anonymous telephone call, although no complaint had been received from any supervisor or employee regarding claimant's vigilance, judgment and conduct.

In any event, this Board would not have reinstated claimant, despite errors on Carrier's part, if the record had established a reasonable doubt that claimant could be relied on as an engineer. Before returning to active duty, claimant must pass a return to duty physical examination, including a drug screen as well as any necessary rules examination.

AWARD:

Claimant reinstated without back pay. To be effective within 30 days.

Adopted at Philadelphia, PA, December 22, 1986.

/s/ Harold M. Weston
Harold M. Weston, Chairman

Illegible
Carrier Member

/s/ R. W. Godwin
Employee Member

ARTICLE G-C-9—Time Allowance—Attending Investigations

(a) If an engineer is not disciplined after being required to attend a formal investigation and loses time on his regular assignment or turn in a pool or extra list, he shall be paid for the time lost due to his attendance at the investigation.

(b) If an engineer is not disciplined after being required to attend a formal investigation at his base terminal and loses no time on his regular assignment or turn in a pool or extra list, he shall be paid for attending the investigation as follows:

(A) If his attendance is immediately before or after his tour of duty, the time spent at the investigation shall be paid for continuous with his tour of duty.

(B) If his attendance is not immediately before or after his tour of duty or is on his assigned day off, actual time spent at the investigation shall be paid for at the straight time rate of pay of the last service performed with a minimum of one day's pay.

(c) (1) When an engineer is not disciplined after being required to attend a formal investigation at other than his home terminal, for attending the investigation he shall be paid on a continuous time basis at the basic daily rate of pay applicable to the last service performed computed from the time he starts from his home terminal and ending at the time he returns thereto with a minimum of one day's pay, except as provided in paragraph (c) (2). Continuous time spent traveling from and to the home terminal shall be computed on the basis of 1.5 minutes for each mile traveled via the best route and added to the time spent at the investigation.

(2) If an investigation is recessed on the first day and continued on the succeeding day or days and the engineer is held over, the continuous time payment shall cease at the time the investigation is recessed on the first day. If such investigation is reconvened the next day and again recessed, the engineer held over shall be paid actual time for attending the investigation with a minimum of one day's pay. When the investigation is reconvened, completed, and the engineer is authorized to return to his home terminal, he shall be paid on a continuous time basis computed from the time the investigation was reconvened on that day until he returns to his home terminal with a minimum of one day's pay.

(3) When the time lost to attend a formal investigation is greater than the total payment provided for in this paragraph (c), the engineer shall be paid for the time lost.

(d) (1) When an engineer is authorized to use other than rail transportation, he shall be reimbursed for out of pocket cost of authorized transportation: when authorized to use his own automobile he shall be reimbursed for the mileage travelled at the applicable car mileage rate paid by the Corporation.

(2) When an engineer is held over at other than his home terminal to attend a reconvened formal investigation he shall be permitted to use lodging facilities provided by the Corporation at that location. If no such lodging facility is available other suitable lodging shall be provided.

(e) When an engineer is required to attend a formal investigation while he is already under pay, no additional payment is due.

(f) The foregoing paragraphs (a), (b), (c), (d), and (e) shall also apply to an engineer who is directed by the Corporation to attend a formal investigation as a witness.

(g) Except when held out of service because of involvement in a serious act or occurrance, an engineer in pool or extra service required to attend a formal investigation shall if unable to accept call for his assignment due to attendance at an investigation be marked up as follows:

(1) An engineer in a pool where a pool engineer is replaced by an extra engineer when he marks off shall be marked up at the bottom of the pool when the extra engineer taking his place returns.

(2) An engineer in a pool where a pool engineer is not replaced by an extra engineer when he marks off or an engineer on an extra list shall be marked up at the bottom of the pool or extra list in the same manner as if he were called for the assignment.

(h) When discipline assessed as a result of a formal investigation is subsequently expunged, an engineer who has incurred wage loss shall be paid for such wage loss incurred. When discipline assessed is subsequently reduced, an engineer who has incurred wage loss shall be paid for such wage loss during any period not part of his final discipline assessment. An engineer paid pursuant to this paragraph shall not be entitled to payment under paragraph (a).